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Supreme Court, U.S.
FILED
07-578 OCT 29 2007
OFFICE OF THE CLERK

No. (1)

In the Supreme Court of the United States

CHARLES A. BURT,

Petitioner,

v.

THE UNITED STATES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION TO EXTEND TIME FOR FILING WRIT OF PETITION FOR CERTIORARI ON GROUNDS OF EXTRAORDINARY CIRCUMSTANCES

AND

PETITION FOR A WRIT OF CERTIORARI

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MOTION TO EXTEND TIME FOR FILING WRIT OF PETITION FOR CERTIORARI ON GROUNDS OF EXTRAORDINARY CIRCUMSTANCES

Counsel of Record for the Petitioner files this motion to extend time to file a petition for certiorari based on extraordinary circumstances that caused reasonable confusion as to the filing due date.

The Appellate Advocacy Clinic at The University of Chicago allows law students to advocate on behalf of clients who cannot afford representation for their criminal appeals. The student that represented Petitioner on his appeal to the Seventh Circuit graduated. A new third-year law student was given the case just three weeks ago to see if any issues merited a petition for certiorari. At the same time, the Clinic was appointed by Judge Darrah of the United States District Court for the Northern District of Illinois to represent the Petitioner in his ongoing civil asset forfeiture proceedings related to his conviction that is the heart of this petition. Because the student was appointed in that civil case at the end of September, there was confusion about what the deadline was for filing this petition.

In short, a third-year law student contributed substantially "in the eleventh hour" to this petition for certiorari to represent the Petitioner all the way through his appeals process. In the interests of justice, the Petitioner should not be penalized as a result of the Clinic's extraordinarily short time frame for handling this petition and the confusion arising out of a late September appointment to Petitioner's

civil case. This petition, based on a 90-day time to file, was due no later than October 24, 2007.

For the foregoing reasons, we ask the Court to extend the time for filing this petition to October 29, 2007.

Respectfully submitted,

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QUESTION PRESENTED

Whether the good faith standard is an improper method for redressing the abuse of Rule 607 of the Federal Rules of Evidence that occurs when the prosecution impeaches its own witness by prior inconsistent statement as a mere subterfuge to get before the jury otherwise inadmissible hearsay evidence even where the witness provides some useful evidence and the trial judge instructs the jury not to consider the statements for the truth of the matter asserted.

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OPINION BELOW

The decision of the Seventh Circuit Court of Appeals is reported at 495 F.3d 733 (7th Cir. 2007), and is reprinted below in Appendix A (hereafter App. A) at 1-19. The District Court did not publish an opinion in this case. The pertinent portions of the trial transcript are reprinted below in Appendix B (hereafter "App. B") at 20-50.

JURISDICTION

The Seventh Circuit entered a final judgment affirming the judgment and sentence of the district court on July 26, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.1 of this Court.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. FEDERAL RULES OF EVIDENCE, RULE 607 and RULE 613(b)

Rule 607 of the Federal Rules of Evidence provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Rule 613(b) of the Federal Rules of Evidence provides that:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party

is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

STATEMENT OF FACTS

The Petitioner, Charles A. Burt ("Burt"), was indicted in the United States District Court for the Northern District of Illinois on seven counts of sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a) (Counts I-VII), one count of distributing child pornography in violation of 18 U.S.C. § 2252(a)(1)(A) (Count VIII), and one count of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(2) and 2252A(a)(5)(B) (Count IX). The District Court conducted a jury trial, which resulted in a guilty verdict on all nine counts.

Federal agents were tipped off to Burt's illegal activities by William Martin ("Martin"), a self-proclaimed "boy lover" in Wisconsin they were investigating as part of a child pornography internet circle, and who is now serving a prison sentence for producing and possessing child pornography in violation of 18 U.S.C. §§ 2251 and 2252A, respectively. During one stationhouse interview, Martin (not under oath) allegedly told a federal agent that he received photos of child pornography from Burt, who lived in Illinois at the time.

As part of its case, the government called Martin to testify about his interactions with Burt. Martin testified that the photo which formed the basis of the count four charge against Burt was found on his computer. (Tr. 257-58.) He also testified that the internet screen names "BSomeSmoke" and "Starved_Rock" were used by Martin and Burt, respectively, in their online chats. (Tr. 258-59.) Later on direct examination, Martin

expressly denied ever receiving pictures of naked young boys from Burt. (Tr. 263.) Anticipating this denial, the prosecution stated to the court during a sidebar, "I can just let [the court and defense counsel] know the rest of direct is going to go this way. He is going to deny everything." (Tr. 266.) Over defense objection, the district judge permitted the government, for purposes of impeachment, to ask Martin whether he previously told agents that he did receive pictures of naked young boys from Burt. (Tr. 267.) The district judge instructed the jury that what lawyers say is not evidence; that facts come from the witness stand. (Tr. 267.) Martin denied ever making such a statement. (Tr. 267-68.) The government also asked Martin whether he previously told agents that he received from Burt a video of Burt engaged in oral sex with a young boy. (Tr. 269.) Martin denied that he received the video from Burt and that the video was real, suggesting instead that it was a computer simulation. (Tr. 273-74.)

Following Martin's testimony, the government called two investigators from the Martin case, Agents Brelsford and McDonough. Agent Brelsford testified that Martin told him his screen name was "BSomeSmoke," that Burt's was "Starved_Rock," and that he met some of the people with whom he traded sexually explicit images on Star Kids (a website Burt administered that posted non-pornographic images of young boys). (Tr. 392.) Over defense objection (Tr. 392), the court permitted the government to question Agent Brelsford about statements Martin made to him during the stationhouse interview, specifically whether Martin said that he received pictures of naked young boys from Burt and whether

he said that he received from Burt a video of Burt engaged in oral sex with a young boy. (Tr. 392, 404-05.)

Prior to the admission of these statements, the district judge engaged in a lengthy sidebar with counsel. (Tr. 393-402.) During the sidebar, defense counsel and the government argued about whether the agent's statements about what Martin said at the stationhouse were being properly used for impeachment purposes or improperly for the truth of the matters asserted. The government replied that they were using the statements for "two purposes really. One is to – it is relevant to Mr. Martin's credibility. It impeaches Mr. Martin. And two is this is actually directly relevant to – in other words, this is not like some sort of collateral matter." (Tr. 394.) After being asked by the district judge whether the government wanted Agent Brelsford's statements admitted for the truth of the matter asserted, the government responded that "that is not the impeachment purpose. . . . [b]ut, I want the jury to believe [Martin] did get [the photo/the video] from Mr. Burt." (Tr. 395-96.) Later in the sidebar, the government stated to the district judge that "it is not hearsay [b]ecause all of the information that [Agent Brelsford] is testifying to . . . is directly perfecting impeachment." (Tr. 396.) At the conclusion of the sidebar, the district judge ruled that the statements could come in for impeachment purposes but not to prove that the statements Martin told Agent Brelsford were actually true. (Tr. 400.) The district judge then instructed the jury that a lawyer is entitled to question the honesty of answers given by a witness by bringing out evidence of prior

statements that the witness made, but that those prior statements themselves cannot be used as evidence to prove something. (Tr. 402-03.)

On direct examination by the government, Agent McDonough testified about numerous matters. Agent McDonough confirmed that the photos that served as the underlying basis for counts one through seven (production of child pornography) were from Burt's computer. (Tr. 484.) He testified about what happened and what was found the day agents arrested Burt and searched his home in Streator, Illinois. (Tr. 496-515.) And finally, he testified about his interview with Martin at the County Jail in Green Bay, Wisconsin. (Tr. 516-32.) During the last portion of his testimony, Agent McDonough testified – over defense counsel objection (Tr. 516), and upon a ruling of the court that they were properly admissible for impeachment purposes – that Martin told him that he communicated with Burt online and that Burt sent him pictures of young boys (Tr. 517), and that Martin told him that he had seen a live webcam video of Charles Burt with a young boy. (Tr. 526).

At the conclusion of the trial, the jury returned a guilty verdict against Burt on all nine counts; he was sentenced to 100 years in prison. Burt took his statutory appeal to the United States Court of Appeals for the Seventh Circuit, where his conviction was affirmed based in part on a finding that the district judge did not abuse his discretion in admitting the testimony of Agents Brelsford and McDonough that Martin said he received pictures of naked young boys from Petitioner during the

investigation. *See United States v. Burt*, 495 F.3d 733, 738 (7th Cir. 2007). App. A at 11.

REASON FOR GRANTING THE PETITION

I. ALL CIRCUITS AGREE THAT THE COMMON LAW RULE AGAINST SHAM IMPEACHMENT SHOULD BE INTERPRETED AS A LIMITATION ON THE IMPEACHMENT RIGHTS PROVIDED IN RULE 607 OF THE FEDERAL RULES OF EVIDENCE. THE CIRCUITS DO NOT AGREE ON HOW TO IMPLEMENT THIS COMMON LAW POLICY. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER THE PROPER METHOD FOR DETERMINING WHETHER A VIOLATION OF THE COMMON LAW RULE AGAINST SHAM IMPEACHMENT HAS OCCURRED IS (1) THE GOOD-FAITH STANDARD, (2) THE SPECIFIC INTENT STANDARD, OR (3) THE APPLICATION OF RULE 403 OF THE FEDERAL RULES OF EVIDENCE.

This petition asks the Court to put back on track a derailed rule of evidence with a history rooted in the laudable concept that no defendant should be convicted on the basis of hearsay evidence. *See Bridges v. Wixon*, 326 U.S. 135, 153-54, 65 S. Ct. 1443, 89 L.Ed. 2103 (1945). In *Kuhn v. United States*, 24 F.2d 910, 913 (9th Cir. 1928), the Court of Appeals for the Ninth Circuit established the principle that a party may not, under the guise of

impeachment, introduce ex parte statements that implicate the accused by first calling a witness to the stand from whom an adverse denial is expected.[1] Over the next several decades, many circuits adopted the principle of *Kuhn*. *See, e.g., United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975) (holding that impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible).

Subsequently, the Federal Rules of Evidence took effect. In particular, Rule 607 cast aside the common law surprise requirement for parties seeking to impeach their own witness in favor of a less restrictive impeachment policy. *See Fed.R.Evid.* 607. It provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." *Id.* Since the enactment of the Federal Rules of Evidence, every circuit incorporated the *Kuhn* principle against pretextual impeachment

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[1] At the time this case was decided and up until Rule 607 of the Federal Rules of Evidence took effect, impeachment of one's own witness was limited to circumstances where the calling party was caught off guard by a witness's response. *See Kuhn*, 24 F.2d at 913. Under the surprise rule, the calling party could impeach the witness only to the extent necessary to "neutralize the effect of the adverse testimony . . ." *Id.* Although the underlying rules governing the circumstances for when a party may impeach its own witness have changed since *Kuhn*, the principle that impeachment may not be abused to circumvent hearsay rules has not. *Compare United States v. Coppola*, 479 F.2d 1153, 1158 (10th Cir. 1973) *with United States v. Peterman*, 841 F.2d 1474, 1479 n.3 (10th Cir. 1989).

as a common law limitation on Rule 607.[2] The uniformity among the circuits ends there. Although each circuit agrees on the underlying principle of *Kuhn*, the actual implementation of the principle is idiosyncratic. Roughly three distinct approaches have developed among the circuits: testing whether the calling party had a good faith basis for calling the witness (hereafter the "general intent" method); testing whether the calling party has a good faith basis for eliciting specific denials (hereafter the "specific intent" method), and testing whether the probative effect of the impeachment testimony outweighs its prejudicial effect under Rule 403 of the Federal Rules of Evidence.[3] Some circuits employ a

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[2] *See, e.g., United States v. Ince*, 21 F.3d 576, 579 (4th Cir. 1994); *United States v. Peterman*, 841 F.2d 1474, 1479 n.3 (10th Cir. 1989); *United States v. Frappier*, 807 F.2d 257, 259 (1st Cir. 1986), cert. denied, 481 U.S. 1006, 107 S. Ct. 1629, 95 L.Ed.2d 203 (1987); *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986), *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 n.2 (11th Cir. 1986); *United States v. Sebetich*, 776 F.2d 412, 429 (3d Cir. 1985); *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985); *United States v. Davis*, 766 F.2d 1452, 1456 (10th Cir. 1985), cert. denied, 474 U.S. 908, 106 S. Ct. 239, 88 L.Ed.2d 240 (1985); *United States v. Crouch*, 731 F.2d 621, 624 (9th Cir. 1984), cert. denied, 469 U.S. 1105, 105 S. Ct. 778, 83 L.Ed.2d 773 (1985); *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984); *United States v. Fay*, 668 F.2d 375, 379 (8th Cir. 1981); *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir. 1980), cert. denied, 499 U.S. 835, 101 S. Ct. 107, 66 L.Ed.2d 41 (1980); *United States v. Dye*, 508 F.2d 1226, 1234 (6th Cir. 1974), cert. denied, 420 U.S. 974, 95 S. Ct. 1395, 43 L.Ed.2d 653 (1975).

[3] Each of these tests play out on the backdrop of abuse of discretion review. *See Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S. Ct. 2778, 49 L.Ed.2d 747 (1976).

combination of these methods.[4] Consequently, defendants facing this form of prosecutorial abuse are treated differently, depending on where their cases are tried. Here, the circuit courts' agreement in principle is quite different from their agreement in practice. In fact, there is a three-way split among the circuits on how to implement a policy against pretextual impeachment. The Supreme Court has never granted certiorari on the issue to resolve which of the methods is proper. We contend that the Court's intervention is sorely needed to unify the circuits and correct the ongoing distortion of an important legal principle, without which defendants, in situations identical to the Petitioner's, will continue to suffer unchecked abuse from the prosecutors that manipulate the Federal Rules of Evidence.

A. Various Methods of Implementing the *Kuhn* Principle Develop After the Federal Rules of Evidence Take Effect

The General Intent Approach. In *Webster*, 734 F.2d at 1193 (7th Cir. 1984), the Seventh Circuit Court of Appeals court found that the good-faith standard – a standard requiring the prosecutor to have a good-faith expectation of useful testimony from his or her witnesses – strikes the best balance where improper impeachment is alleged. In that case, the prosecutor called a convicted bank robber to

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[4] *See, e.g., Frappier*, 807 F.2d at 259-60 (finding both that the primary purpose in putting witness on stand was not subterfuge and that impeachment was not so prejudicial as to mandate exclusion).

testify against the defendant who was on trial for aiding and abetting the same robbery of a federally insured bank. *See id.* at 1192. The bank robber's testimony, if believed, tended to exonerate the defendant (the opinion is ambiguous as to whether the government anticipated the exculpatory comments). *Id.* The government then introduced prior inconsistent statements the bank robber gave the FBI that implicated the defendant. *Id.* The trial judge instructed the jury to use the statements only to evaluate the truthfulness of the bank robber; defendant was found guilty and sentenced to nine years in prison. *Id.*

Circuit Judge Posner, writing for a three judge panel, found no reason why the government should be "put to the choice between the Scylla of forgoing impeachment and the Charybdis of not calling at all a witness from whom it expects to elicit genuinely helpful evidence." *Id.* at 1193. This reasoning follows the "general intent" approach adopted by some circuits. Under this approach, if a witness provides both useful and adverse testimony (as occurred at Petitioner's trial), courts find that no prosecutorial abuse occurred since some good came from calling the witness. *See also, United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991) ("[t]he test is whether the prosecution exhibited bad faith by calling a witness sure to be unhelpful to its case[]"); *DeLillo*, 620 F.2d at 946 (reasoning that witness was not called to the stand as a subterfuge since witness's testimony was essential in many other areas of the government's case).

The Rule 403 Balancing Approach. In *Ince*, 21 F.3d at 582, the Court of Appeals for the Fourth

Circuit held that the trial court abused its discretion in admitting hearsay offered by the prosecution under the guise of impeachment in a trial for assault with a dangerous weapon. Jettisoning the "general intent" approach, the court stated that "[f]ederal evidence law does *not* ask the judge, either at trial or upon appellate review, to crawl inside the prosecutor's head to divine his or her true motivation." *See id.* at 580 (emphasis in original). Instead the court insisted that a trial court must apply Federal Rule of Evidence 403 and weigh the testimony's impeachment value against its prejudicial impact. *Id.* Using that analysis, the court ultimately found that the prejudicial impact of the testimony, an ex parte confession by the defendant, outweighed its probative ability to discredit the prior testimony of a responding officer who claimed that she could not recall key events or statements made leading up to the defendant's arrest. *Id.* at 581-82.

Under this framework, the appellate court focuses on whether the trial court abused its discretion in its application of the Rule 403 balancing test. Specifically, the reviewing court compares how damaging the "impeachment" testimony was to the defendant's case (a confession being the worst-case scenario) with how aptly the ex parte testimony discredits a previous witness. *See Ince*, 21 F.3d at 580. In these cases, the trial court is typically reversed if it permitted the government to impeach where it had no need to attack the previous witness's credibility or the out-of-court statements do not actually call into question the prior witness's truthfulness. *See also Frappier*, 807 F.2d at 260

(finding a damaging fact admitted against the defendant on so-called "impeachment" not so prejudicial as to mandate exclusion of the evidence).

The "Specific Intent" Approach. In *Peterman*, 841 F.2d at 1480, the Court of Appeals for the Tenth Circuit held that the trial court did not abuse its discretion in permitting the government to elicit testimony regarding the conviction of a codefendant for purposes of impeachment where it was not used to establish the guilt of the defendant. In that case, the government impeached a codefendant who testified adversely about the defendant's involvement in a wire-fraud conspiracy by introducing evidence of his prior conviction for his role in the same conspiracy. *See id.* at 1479. The court framed the central issue, providing that "[t]he decisive issue for us is what the government expected [the codefendant] to say." *Id.* at 1480. To this end, the court observed that (1) the prosecutor and a USDA special agent met with the codefendant before trial and expected that he would modify his original testimony and admit his guilt with respect to the wire fraud, and (2) defense counsel met with the codefendant the night before the government called him as a witness, possibly influencing him. *Id.*

Similarly, in *Coppola*, the court reviewed a claim that the prosecutor used sham impeachment to introduce hearsay for its substantive value. The Court of Appeals for the Tenth Circuit observed that while impeachment of one's own witness is generally non-problematic, it does not "furnish an occasion for the *wholesale* introduction of out of court statements, statements which are hearsay and which could be confused by the jury and considered as substantive

evidence." *See Coppola*, 479 F.2d at 1157-58 (emphasis in original).[5] As demonstrated by these two cases, the focus under the specific intent approach is not holistic; rather, it looks at the true purpose behind specific questions asked during testimony, events surrounding the trial, and the prior knowledge of the calling party that the witness would testify adversely.

B. The Relative Merits of Each Approach on the Problem of Pretextual Impeachment

1. The General Intent Approach Side-Steps the Key Issue

In so far as the "general intent" circuits approach the problem of sham impeachment by asking whether a witness served any useful purpose other than laying the foundation for impeachment, they miss the point. In *Webster*, this misguided focus is executed through the "good faith standard," which looks at whether the government benefits from putting a witness on the stand that it later impeaches. *See Webster*, 734 F.2d at 1192-93. By reviewing the witness' testimony holistically, courts like *Webster* overlook the specific portion of the testimony in which the prosecutor elicits anticipated denials to set the stage for "impeachment" using

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[5] Although this case was decided prior to the enactment of the Federal Rules of Evidence, and as such, less directly addresses the way in which the principle of *Kuhn* has diverged *since* the enactment of the Federal Rules of Evidence, the Tenth Circuit's analysis of pretextual impeachment did not change significantly post-enactment, and thus this case is as apposite as any. *See United States v. Peterman*, 841 F.2d at 1480.

damning hearsay. Rather than hitting the nail on the head, the general intent test for prevention of pretextual impeachment puts the hammer through the wood. Simply because a witness provides some useful testimony does mean that the government has free reign to exact anticipated denials solely for the purpose of laying the foundation for a pretextual impeachment that reveals otherwise inadmissible hearsay implicating the defendant. The reality is that the government can be acting in good faith with respect to some of its question, but in bad faith with respect to others. Courts should not excuse questioning conducted in bad faith simply because questioning starts off in good faith. The analytical framework of the "general intent" approach implodes because it only works when the one and only reason a prosecutor calls a witness is to lay the foundation for sham impeachment – in that case there are no good faith questions to obscure the intent of the prosecutor in calling the witness. Where witnesses are both useful and adverse, the "general intent" test lets the bad faith questions ride on the back of the good faith questions.[6] This is an unacceptable implementation of the *Kuhn* principle.

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[6] Other cases indicate with equal miscalculation that the only viable alternatives are the wholesale denial or accession to the witness taking the stand. *See, e.g., United States v. Gilbert*, 57 F.3d 709, 711-12 (9th Cir. 1995) (employing the primary purpose test, which looks at the predominant motive of the prosecutor in calling a witness that provides both useful and adverse testimony, to determine whether witnesses were put on the stand in bad faith to get substantive evidence not otherwise admissible before the jury); *United States v. Eisen*, 974 F.2d 246, 262-63 (2d Cir. 1992) (reasoning that because some of the witnesses testimony was instrumental to

Not surprisingly, the same faulty logic of *Webster* appeared in the reasoning of the Seventh Circuit's opinion on Petitioner's appeal. *See Burt*, 475 F.3d at 738 (stating that "[i]t boggles the mind that Burt would claim on appeal that there was no good-faith reason for the government to call Martin other than to tee up Brelsford's and McDonough's impeaching testimony") (citing *Webster*, 734 F.2d at 1193) (App. A at 11).

Moreover, no jury instruction limiting or attempting to cure the presence of ex parte statements introduced through sham impeachment can repair this rank abuse of the Federal Rules of Evidence. First, a limiting instruction *presupposes* the government has a legitimate impeachment purpose. But with sham impeachment, we know this is never true. If a district judge is "limiting" the impact of testimony, it must in part be sanctioning its admission. Pretextual impeachment shouldn't be sanctioned at all, much less in part. Indeed, several circuits mistakenly rely on the limiting instruction in sham impeachment cases to curb jury confusion or prejudice to the defendant, *see, e.g., Burt*, 495 F.3d

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the government's case, the government had free reign to impeach the witness about aspect's of his testimony that conflict with the government's account of the same events); *DeLillo*, 620 F.2d at 946 (holding that a trial judge did not abuse his discretion in allowing the government to impeach its own witness by introducing a redaction of a tape recording in which the witness was heard making statements inconsistent with those posited at trial, and which implicated one of the defendants on a count of bribing a county inspector on grounds that the witness's "corroborating testimony was essential in many areas of the government's case").

at 738 (claiming that the court's curative instructions were more than adequate to ensure that the evidence did not mislead the jury or prove to be more prejudicial than probative) (App. A at 11); *Hogan*, 763 F.2d at 702 (providing that limiting instructions help cure jury confusion). Relying on a limiting instruction to reduce jury confusion between the substantive and impeachment value of evidence wholly evades the threshold problem of the prosecutor's feigned impeachment purpose because it does not question prosecutorial motive. However, this motive must be questioned if Rule 607 as limited by the *Kuhn* principle is to have any real meaning.

While issuing a curative instruction does comport with the notion that prosecutorial misconduct has taken place, it falls far short of protecting the defendant from a hearsay-based conviction. No curative instruction suffices when the ex parte statements admitted under the guise of impeachment directly substantiate one or more of the charges against the defendant. *Cf. United States v. Krulewitch*, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L.Ed. 790 (1949) (Jackson, J., concurring) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction") (internal citations omitted). The Fourth Circuit in *Morlang* aptly described the flaw of the curative instruction:

> The introduction of such testimony, even where limited to impeachment, necessarily increases the possibility that a defendant may be convicted on the basis of unsworn evidence, for despite proper instructions to

> the jury, it is often difficult for them to distinguish between impeachment and substantive evidence. Thus, the danger of confusion which arises from the introduction of testimony under circumstances such as are presented here is so great as to upset the balance and warrant continuation of the rule of exclusion.

531 F.2d at 190 (internal citations omitted). Circuits too frequently (and erroneously in the case of the limiting instruction) rely on jury instructions to mitigate the damage of sham impeachment. In doing so it gives the "go ahead" signal to prosecutors who might otherwise hold back from this manipulation of the Federal Rules of Evidence.

2. Application of the Balancing Test Under Rule 403 of the Federal Rules of Evidence Similarly Miscalculates the Nature of Sham Impeachment

Analysis conducted under the framework of Rule 403 of the Federal Rules of Evidence is structurally flawed. The Rule 403 balancing test inherently condones prosecutorial manipulation of Rule 403 to get in otherwise inadmissible hearsay so long as that which is admitted is not too prejudicial. This will systematically fail to address pretextual impeachment because the ex parte statements introduced by the prosecution nearly always directly implicate the defendant with respect to one or more charges against them. Practically speaking, prosecutors only perform this sort of impeachment song and dance because they have no other way of

proving the charge substantiated by the ex parte statements. Even if they do, the ex parte statements illegally bolster the properly admitted evidence.

This is precisely what happened to Petitioner at his trial below. The prosecution had some indirect evidence tending to show that the Petitioner distributed child pornography in interstate commerce, but nothing concrete. *See supra*, Statement of Facts at 6-7. Specifically, the government had in evidence those facts listed in the Court's opinion, App. A at 10. Rather than relying on the jury to add two plus two, the prosecutor called Martin to the stand, from whom she expected to elicit, and did elicit, both useful and adverse testimony, as demonstrated by the prosecutor's remarks to the trial judge at sidebar: "[]I can just let you know the rest of direct is going to go this way. He is going to deny everything." *See supra*, Statement of Facts at 8. By starting out with questioning that revealed useful testimony, the trial judge was led to believe the prosecutor had a good faith basis for calling Martin, and allowed the bad faith questioning to go forward. At that point, the prosecutor laid the foundation for sham impeachment by asking Martin questions she knew he would answer adversely. *See supra*, Statement of Facts at 7-9. The prosecution then called two federal agents who testified that Martin told them he received some of his child pornography from Burt. If the jury took the agents' statements for the truth of the matter asserted, the statements essentially proved the Count VIII charge of distribution against Petitioner.

Moreover, some circuits have irreconcilably meshed together the general intent approach with the Rule 403 balancing approach, leading to even greater confusion. *See, e.g., Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 n.2 (11th Cir. 1986) (adhering to intent-based analysis of whether prosecutor below improperly impeached a witness for the sole purpose of introducing otherwise inadmissible testimony, but remarking that one of the court's precedents was inapposite because in that case the district court's ruling that it reviewed was based on Rule 403 of the Federal Rules of Evidence).

Although tempting at first blush due to district judges' familiarity and experience with applying Rule 403, the balancing framework for reviewing possible abuses of Rule 607 of the Federal Rules of Evidence fatally fails to address the prosecutorial abuse aspect of sham impeachment. In doing so, the application of Rule 403 ignores the key harm inflicted.

3. Specific Intent Best Addresses the Unique Obstruction of Justice Created by Pretextual Impeachment

Unlike the "general intent" approach seen in the Second and Seventh Circuits, and unlike the Rule 403 balancing approach seen in the First and Fourth Circuits, the "specific intent" approach adopted principally by the Tenth and District of Columbia Circuits is dually beneficial. First, it squarely addresses the specific harm posed by sham impeachment and second, it is also reasonably administrable for district judges. In making a determination that the specific intent of a prosecutor

(based on certain indicia outlined below) was pretextual, a district court is sending a signal to all practitioners that technical compliance with the Federal Rules of Evidence will not be tolerated when the spirit of the questioning is pernicious. This sort of shaping of professional conduct should be supported by this Court. The alternative "general intent" and Rule 403 balancing approaches fail to sufficiently condemn this widespread prosecutorial trickery. In *Peterman*, the Court of Appeals for the Tenth Circuit addressed particular circumstances surrounding the government's impeachment of its witness who surprisingly recanted. *See Peterman*, 841 F.2d at 1479. In particular it observed the reasons why the government called the witness, the details of the repudiating witness's behavior on the stand, the government's explanations for why it was genuinely surprised by the witness, and the defense counsel's night-before-testimony meeting with the witness.[7] *See id.* We contend that this focus on the specific circumstances surrounding sham impeachment makes greatest sense given that prosecutors can easily question in good and bad faith within the span of one direct examination. *See Morlang*, 531 F.2d at 189.

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[7] *See also Coppola*, 479 F.2d at 1158 (ultimately concluding after conducting a "careful reading of the *entire* testimony" that prosecutor engaged in pretextual impeachment where the witness gave both useful and adverse testimony to the government) (emphasis added); *Johnson*, 802 F.2d at 1466 (noting that the prosecution informed the court that the statement was being offered to impeach by prior inconsistent statement and that the live testimony of the adverse witness was not a surprise as he made it plain during a hearing out of the jury's presence that he would not implicate the defendant).

It is true that exclusion of impeachment testimony is required if a district judge finds that a prosecutor is attempting a sham impeachment. *See, e.g., Sebetich*, 776 F.2d at 428 (excluding impeachment testimony on grounds that it was introduced for purposes of circumventing the hearsay rule by means of Rule 607). Some commentators find this exclusionary rule, much like the Fourth Amendment's exclusionary rule, to be an unduly harsh obstruction to the truth-finding process that all trials seek to eliminate. *Compare*, William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 Harv.J.L. & Pub. Pol'y 443, 445-446 (1997) *with* KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 38 (2006) (noting that a rule against showing prior inconsistent statements of one's own witness to aid in evaluating the witness's testimony is a serious obstruction to the ascertainment of truth). However, the rule of exclusion will only apply where a district court is put on notice that the government's impeachment purpose is pretextual. Second, the common indicators of a pretextual purpose are easily identifiable by district judges: (1) a statement by the prosecutor that it knows or has a strong suspicion that the witness will recant in whole or in part; (2) an admission by the prosecution during a sidebar that it desires the jury to believe the impeaching hearsay for the truth of the matter asserted; (3) a statement or other indication that the government does not have another way to prove a charge against the accused other than to get the otherwise inadmissible hearsay into evidence under the guise of impeachment, and (4) the lack of self-serving motive by the government for impeaching a witness

that has provided a great deal of damaging testimony against the defense.

All of these indicators of pretextual impeachment purpose existed at Petitioner's trial. During a sidebar in the middle of Martin's direct examination, the prosecutor stated to the judge "[I] can just let you know the rest of direct is going to go this way. He is going to deny everything." (Tr. 266.) This is an open statement of anticipation of denial. Furthermore, the prosecution's purpose in questioning Martin on the point of whether he received illegal photos from Burt was admittedly not for impeachment, but for substance. When asked by the judge for what purpose she sought to introduce Agent Brelsford's statement that Martin told him he received child pornography from Burt, the following exchange occurred:

PROSECUTOR: The – it is two purposes really. One is to – it is relevant to Mr. Martin's credibility. It impeaches Mr. Martin. And two is this is actually directly relevant to – in other words, this is not like some sort of collateral matter. This is – these are statements that are –

THE COURT: You want – want it admitted for the truth of the matter asserted therein, right? You want the jury to believe Mr. Burt did send the pornographic materials to Mr. Martin, correct?

PROSECUTOR: That is not the impeachment purpose.

THE COURT: No, but that is the – but that is a – the more important purpose because in fact you want to be able to argue to the jury when the case is over that Mr. Burt sent pornographic material to Mr. Martin.

PROSECUTOR: Well, I would love to be able to argue that.

THE COURT: Well, with – unless there is some – and if Mr. Marin denied it, unless you have forensic evidence that is what was done, which I gather we don't have, then what evidence do we have that it was done?

PROSECUTOR: We –

THE COURT: We have, I guess, the statement of the previous witness who said that he had gotten images from Mr. Martin, right?

PROSECUTOR: We have already introduced forensic evidence that it was done, that is, that these images were taken in Mr. – I am sorry, were retrieved from Mr. Martin's computer that was taken from Mr. Martin's house.

THE COURT: Right, right. But he – but this morning he denied getting it from Mr. Burt –

PROSECUTOR: Yes.

THE COURT: -- right? So –

PROSECUTOR: But I want the jury to believe he did get it from Mr. Burt. I would like it if they believed that.

(Tr. 394-96.) It is clear from the last lines of this exchange that the government's impeachment of Martin through Agent Brelsford was pretextual. Further evidence of the pretextual impeachment's highly prejudicial effect is that the government had only indirect evidence to prove the distribution charge against the Petitioner aside from Martin's prior inconsistent statement; specifically, Martin's testimony that: (1) he knew Burt, (2) had a photo Burt produced on his computer, (3) that Martin engaged in online chats with Burt, and (4) that he had once gone to visit Burt in Illinois at Burt's home. (Tr. 256, 258-59, 261.) Finally, the government had no other reasonable motive for impeaching Martin, after he gave evidence against Burt that, if believed, would allow the jury to infer that Burt distributed the count four photo to Martin. The only reason the government had to impeach Martin was to bring in Agents Brelsford's and McDonough's statements that Martin told them during the earlier investigation that he received pictures of naked young boys from Burt. When put together, the above referenced indicators of a pretextual impeachment purpose are sufficient to require a judge to cut off the questioning of a witness which is conducted only to lay a foundation for improper impeachment.

CONCLUSION

When the government's impeachment is pretextual, the miscarriage of justice is two-fold: the information is typically inculpatory as to the defendant, and the information gets to the jury through a manipulation of the Federal Rules of Evidence. The Court should grant the petition for a writ of certiorari and reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United States of America, *Plaintiff-Appellee*,
v.
Charles Burt, *Defendant-Appellant*.

No. 06-3415

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division.
Wayne R. Andersen, District Judge.
(04-CR-273)

Argued: April 4, 2007

Decided: July 26, 2007

Before KANNE, WILLIAMS, and SYKES, Circuit Judges

COUNSEL

ARGUED: Adam Weinstein under Supervision of H. Melissa Mather, Mandel Legal Aid Clinic, Chicago, Illinois, Abner J. Mikva, University of Chicago, Center for Studies in Criminal Justice, Chicago, Illinois, for Appellant. Monika Bickert, Assistant United States Attorney, Chicago, Illinois, for Appellee.

OPINION

KANNE, Circuit Judge.

Charles Burt was convicted by a jury of nine counts: seven counts of sexual exploitation of a minor, one count of distributing child pornography, and one count of possession of child pornography. He challenges a number of the evidentiary decisions by the district court, and argues that the cumulative effect of the errors deprived him of a fair trial. Finding no error, we affirm.

I. BACKGROUND

Charles Burt worked in the photography department of the local grocery store. Photography was a hobby and an occasional side business for him. A federal investigation into a child pornography ring led to a search warrant being issued for Burt's house. The warrant was executed, and agents recovered photography and computer equipment from his house. Based on files found on his computer and information recovered from other computers seized in the investigation, as well as testimony from other suspects, the government eventually secured a superseding indictment containing nine counts. The first seven counts were for exploiting children in the production of pornography in violation of 18 U.S.C. § 2251(a). An eighth count charged that he distributed child pornography in violation of 18 U.S.C. § 2252(a)(1)(A). Count nine charged Burt with receipt and possession of child pornography in violation of 18 U.S.C. § § 2252A(a)(2) and 2252A(a)(5)(B).

The evidence at trial was more extensive than we need recount here. We will focus on those aspects of the evidence that have been raised by Burt on appeal. The government's case was made up of three categories of witnesses. One group consisted of the agents and officers who investigate child pornography and who had been involved in this case. A second category consisted of some of the children who had been photographed. A third category included William Martin and Brian Urbanawicz, both of whom were in prison for charges related to child pornography or child abuse and had been part of the group of child pornographers whose trail had eventually led to Burt's doorstep.

As part of its case, the government established that photographs of young boys taken by Burt were the "holy grail" among an online community of child pornography traders and admitted pedophiles. Tr. at 198. The government called William Martin, who was serving a prison sentence for child pornography in Wisconsin. Martin's computer had contained numerous explicit pictures of children, and a video showing Burt molesting a child. Martin testified about his online relationship with Burt, including trading photos, online chats that both of them had taken part in, and some of the technical details of how Martin had administered one of the internet sites where self-described "boy-lovers" would congregate. Specifically, he testified that the photo which was the basis for count four of the indictment was found on his computer. Tr. at 257-58. He also testified that the internet screen names "BSomeSmoke" and "Starved_Rock" were used by Martin and Burt, respectively.

When the government asked Martin whether Burt had sent him photos of naked boys, he denied it. Over a defense objection, the court allowed the government to ask Martin whether he had ever made prior inconsistent statements when he was being interviewed by federal agents after his arrest. The court admonished the jury that the question was not to be considered evidence, but that evidence comes only from "the witnesses, the documents, and the stipulations." Tr. at 267. Martin denied that he had ever told the investigators that he had received any of his collection of child pornography from Burt.

The government later called two of the investigators from the Martin case. Agent Brelsford testified that Martin had, in fact, previously implicated Burt when he was interrogated about the pornography found on his computer. Over defense counsel objection, the court allowed Brelsford's testimony, which the government elicited with the expressed intent to impeach Martin's denial that Burt was the source of some of his pornography. The court instructed the jury that, on this topic, Brelsford's testimony was only to be considered for the purposes of impeaching Martin's testimony. The court's limiting instruction to the jury occupies one and one-half pages of trial transcript. Tr. at 402-03. The government later called Agent McDonough, part of whose testimony also impeached Martin's denial that Burt was the source of at least some of his pornography.

During Brelsford's testimony and McDonough's testimony, the government also

admitted logs of internet chat conversations between two people. The screen names that were used on the internet chat were "Starved_Rock" and "BSomeSmoke." Over a defense objection, when the government published those transcripts of the chat room conversations, the district court allowed the government to substitute "Burt" and "Martin" in place of the screen names. The district court admonished the jury that they were not to assume that the chat was actually conducted by Burt and Martin, but that the earlier evidence could have allowed them to make that inference, and "whether or not they really authored these statements is something that you will have to conclude." Tr. at 413.

Of the three children who testified against Burt, two made allegations that he had molested them. In the case of one child, David, the act of alleged molestation was captured on video, and this video was the underlying pornography charged in count five of the indictment. In the case of the other child, Austin, no act of molestation was ever charged and none of the alleged pornographic pictures showed Burt molesting Austin.

A defense theme throughout the trial had been that not all nude photos of children are pornographic. In particular, the defense's case went, the government was required in this case to prove that the photographs were "lascivious exhibition of the genitals." 18 U.S.C. § 2256(2)(A)(v). (There are other ways that a photo can count as depicting sexually explicit conduct under the statute, but the parties agree that in this

case the government could not prove them.) In his opening statement, Burt's counsel framed the case as being about "a small town, hardworking professional photographer who took pictures of young boys engaged in sports, sports attire, athletic equipment, for the purpose of putting them on a legitimate non-pornographic website." Tr. at 53. During trial, and outside the presence of the jury, the parties had sparred about whether Burt should be allowed to show the jury pictures of nude boys that could be found in books available in the library. Burt's argument was that the government was required to prove more than just the creation of nude photos. During closing argument, the defense argued various times to the jury that photographs and videos of naked children are not necessarily pornographic. See, e.g., Tr. at 602 ("You can go to a library, you can go to a church, you can go anywhere and see a picture of a boy or a young child with his penis exposed."); Tr. at 604 ("Not every exposure of genitalia is lascivious."); Tr. at 610 ("Just because you see a naked body or a naked child or the genitalia doesn't mean it is lascivious."); Tr. at 610-11 ("You can go to the library and find all sort of pictures that look like Charles Burt's pictures."); Tr. at 612 ("If you find that that is lascivious, you have to find that every single medical picture depicting a child's penis-you would have to find that lascivious as well."); Tr. at 615 ("... you would have medical doctors, medical schools, you would have all sorts of artists, going to jail.").

The jury returned guilty verdicts on all nine counts. The court sentenced Burt to one hundred years in prison, "a whopper of a sentence." United

States v. Bullock, 454 F.3d 637, 637 (7th Cir.2006) ("One hundred years is a long time-one year longer, in fact, than the standard lyrical shorthand for an unimaginably long sentence."). Burt appeals a series of evidentiary decisions by the district court, and argues that their cumulative effect deprived him of a fair trial.

II. ANALYSIS

A. The Brelsford and McDonough Testimony

We review evidentiary rulings for abuse of discretion. United States v. Luster, 480 F.3d 551, 556 (7th Cir.2007). Burt argues on appeal that Brelsford's and McDonough's testimony about what Martin said when he was questioned in an earlier investigation was inadmissible hearsay and that the district court abused its discretion in admitting the testimony.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED.R.EVID. 801(C). In this case, we conclude that the testimony was offered to impeach Martin, not to prove the truth of the matter asserted. The court was very thorough in warning the jury about the distinction between the two. The issue first arose when Brelsford took the stand. After explaining to the jury that the government intended to impeach Martin's testimony, the court explained to the jury that "those prior statements themselves cannot be used as evidence to prove

something." Tr. at 402. Specifically foreshadowing the content of the testimony, the court continued that the government "cannot use what-what Mr. Martin told this agent to prove that Mr. Burt sent the images to Mr. Martin. [The government] would have to have other evidence that was direct, not statements that somebody made outside of court to prove that." Tr. at 403. The court concluded that the testimony "cannot be used by you to prove the truth of what the agent says Mr. Martin said to him." Id. The testimony is therefore not hearsay, and falls squarely within the standard use of prior inconsistent statements to impeach a prior witness's credibility. See KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 36 (2006). The fact that Martin was the government's witness is not generally a bar to the government then impeaching him. See FED.R.EVID. 607.

Burt argues on appeal that the government improperly called Martin only to provide a backdoor to allow Brelsford's and McDonough's testimony. We have held that "it would be an abuse of the rule, in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant." United States v. Webster, 734 F.2d 1191, 1192 (7th Cir.1984). Burt argues that Webster has created a "modified version of the primary purpose test" set out in United States v. Morlang, 531 F.2d 183 (4th Cir.1975), and cites to Webster and United States v. Kane, 944 F.2d 1406 (7th Cir.1991), for support. But neither of those cases makes any mention of a primary purpose. Both cases reiterate that the test is whether the

prosecution calls the witness in bad faith. Kane, 944 F.2d at 1412 ("The test is whether the prosecution exhibited bad faith by calling a witness sure to be unhelpful to its case."); Webster, 734 F.2d at 1192 ("The good-faith standard strikes a better balance....").

Burt is unable to point to any direct evidence that the government acted in bad faith, but argues that because the government knew ahead of time that at least some of Martin's testimony would be adverse to its case, it must have been acting in bad faith. Appellant's Br. at 20 ("[T]he government had no good-faith basis for calling Martin, and even conceded ... that its purpose was to impeach his testimony."). Burt points to a side-bar discussion in the midst of Martin's testimony, where the government acknowledged that Martin would likely deny aspects of his previous statements and that the government would subsequently call Brelsford and McDonough to impeach Martin on those parts of his testimony. Tr. at 264-67.

But it cannot be that any time the government suspects that a witness will lie on some aspect of his testimony that it is barred from using the witness. Webster actually envisioned just the type of situation that we deal with here, and held that the testimony would be admissible:

Suppose the government called an adverse witness that it thought would give evidence both helpful and harmful to it, but it also thought that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement.... [W]e are at a loss to understand why the government should be put to the

choice between the Scylla of forgoing impeachment and the Charybdis of not calling at all a witness from whom it expects to elicit genuinely helpful evidence. Webster, 734 F.2d at 1193.

The question for us, then, is whether there is enough useful information in Martin's testimony to support the district court's decision to allow it. Reviewing the transcripts, we conclude that it was well within the district court's discretion to allow Martin's testimony, even knowing that the government would eventually impeach some of it through the testimony of Brelsford and McDonough. In the portion of Martin's testimony that had already been concluded before the questioning turned to his previous statements, the government had already elicited the following information from him: (1) that he was a collector of child pornography and a pedophile, (2) that he was an on-line associate of Burt, (3) that Martin ran a website called "Star Kids" which previous testimony had established was a site where other pedophiles frequently congregated, (4) that his computer, seized in Wisconsin, had included the picture which was the foundation for count four of the indictment, (5) that his computer contained several videos of Burt and other people doing unnamed acts, (6) that Martin's screen name was "BSomeSmoke" and Burt's was variously "Exsell" or "Starved_Rock," (7) that he and Burt traded photos and videos of children on the internet, (8) that he used computer encryption to hide child pornography, and (9) that he had brought children from Wisconsin to Illinois to have Burt photograph them.

It boggles the mind that Burt would claim on appeal that there was no good-faith reason for the government to call Martin other than to tee up Brelsford's and McDonough's impeaching testimony. The authentication of the count four photo on his computer in Wisconsin was sufficient by itself to support calling Martin. The district court did not abuse its discretion in allowing Martin, Brelsford, or McDonough to testify as they did. The court's curative instructions were more than adequate to ensure that the evidence did not mislead the jury or prove to be more prejudicial than probative.

B. The "Starved-Rock" Chat Transcripts

During Brelsford's and McDonough's testimony, the government also published to the jury two exhibits, which are referred to by the parties as the "Starved Rock Chat" and the "Starved Rock Chat Excerpts." Burt did not object to the admission of Starved Rock Chat, but did object to the admission of the excerpts. Tr. at 184, 407-12. Both pieces of evidence were based on a log of a Yahoo! chat between "BSomeSmoke" and "Starved_Rock" which was recovered off of Martin's computer in Wisconsin. Recall that Martin testified that those names referred to Martin and Burt respectively.

Burt now argues on appeal that the admission of the chat as a whole was an abuse of discretion. We disagree. Although we have not considered the question before, other circuits have concluded that properly authenticated chat logs may be admitted in evidence. See, e.g., United States v. Tank, 200 F.3d 627 (9th Cir.2000); United States v. Simpson, 152

F.3d 1241 (10th Cir.1998). Those portions of the chat which represent Burt's writings were properly admissible as admissions by a party opponent under FED.R.EVID. 801(d)(2). Burt argues that the inclusion of Martin's half of the conversation is inadmissible hearsay, and unduly prejudicial at any rate. The government counters that Martin's half of the conversation is necessary to provide context to Burt's comments, and was not hearsay because it is not offered for the truth of the matter asserted.

Turning first to the question of whether Martin's portion of the chat constitutes hearsay, we are unable to see any way that the chat was being admitted for the truth of the matter asserted. Without delving into all the graphic details that the chat logs depict, we can summarize Martin's contribution to the conversation as follows: he asserts that he is searching for something (presumably a digital photo) that is "not too graphic" for Burt. He tells Burt the name of the file that he had just sent, and that he "better find it ... don't [w]ant that floating around." He goes on to describe somebody as "way too ummmmmmmmmmmmmmm", "horny all the time an [d] will literally rape me in my sleep" and that "he never really had someoen [sic] do that [before]." Martin then begins a long description about how one of his victims "actually LOVES it ... I am not talking oral here." He then concludes that "all boys love oral" which he describes as "normal" but that penetration is "not normal."

There is no reason to believe that Martin's statements were introduced for the purpose of proving the truth of the matter asserted in them. The government had no reason to prove the particular sexual activities that Martin engaged in with particular boys whose photos he might have been sharing with Burt. Nor did the government have any reason to prove the truth of Martin's assertions that one of his victims rapes him in his sleep, or that "all boys love oral" sex but that penetration is not normal. Other than a conclusory statement that the government offered Martin's words for the truth of the matter asserted, Burt's briefs are entirely devoid of any explanation of how the government sought to establish the truth of the statements, or even which statements the government hoped to prove true through Martin's words. In short, Martin's portion of the chat log was not offered for the proof of any matter asserted in them, and therefore was not hearsay.

Burt makes an additional argument with respect to the excerpted chat, which the government had altered to replace the screen names with real names, that another layer of hearsay was added to the exhibit making its admission an abuse of discretion. The parties have not pointed us to any direct authority on this issue, and it appears to be a question of first impression. We are persuaded that the altered chat logs fall into the category of a demonstrative exhibit, making their admission subject to analysis under FED.R.EVID. 403.

We come to this conclusion by considering the altered chat logs in the context for which they were

offered, and by analogizing to other more commonly accepted demonstrative exhibits. When the government introduced the excerpts, the prosecutor asked Brelsford to authenticate the excerpts. He replied that it was "a summary, a synopsis, of the chats reflected in the previous Government exhibit." Tr. at 406. After Brelsford clarified that the excerpts were "direct quote excerpts of the overall chats," the government asked, "have you reviewed [the excerpts] and determined that that exhibit accurately transcribes what is portrayed in Government Exhibit Starved Rock Chat?" Id. at 407. Brelsford agreed that, with the exception of two typographic errors which were corrected, "the actual context of the communication is verbatim." Id.

The court admonished the jury that they were to independently evaluate whether the evidence convinced them that the screen names were actually used by Martin and Burt. The court noted that there was evidence that the screen names corresponded to those individuals, and warned the jury that "even though [the] exhibit *740 says Martin and Burt ... if I advise you that in fact it was Starved Rock and BSomeSmoke ... that is what it said." Id. at 412-13. Finally, the court clarified to the jury that "whether or not [Martin and Burt] really authored these statements is something that you will have to conclude." Id. at 413. At that point the government led agent Brelsford through an analysis of the chat logs to clarify what Martin and Burt had written to each other.

"It is today increasingly common to encounter the use of demonstrative aids throughout a trial....

Demonstrative aids take many forms; [including] duplicates, models, maps, sketches and diagrams, and computer-generated pedagogic aids." KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 212 (2006). The decision to allow demonstrative aids rests in the discretion of the district judge. United States v. Salerno, 108 F.3d 730, 742 (7th Cir.1997). We have previously upheld tapes and a tape player being brought to the jury deliberation room. United States v. Hofer, 995 F.2d 746, 748-49 (7th Cir.1993). Likewise we have upheld a district judge's decision to allow the jury to handle firearms that were admitted into evidence. United States v. Burrell, 963 F.2d 976 (7th Cir.1992). In United States v. Welch, 945 F.2d 1378 (7th Cir.1991), we held it not to be an abuse of discretion for a district judge to exclude a proffered transcript of an audio tape that included extensive editorial commentary on defense suspicions that the tape showed signs of being edited. In Salerno, we upheld the district judge's decision to admit into evidence a scale model of a crime scene and to allow the model to be brought into the deliberation room. 108 F.3d at 742.

We see no reason not to extend the logic of allowing models, maps, sketches, and diagrams to incorporate these particular chat excerpts as well. In this case, the excerpted chat logs were used to aid two witnesses in interpreting and explaining the raw computer chat logs, which forensic examiners had recovered from Martin's computer. Just as a sketch or model of a crime scene can be used to help a witness to recount aspects of testimony and to make that testimony more accessible and understandable

for the jury, so might affixing the names of real people in place of their aliases put the computer chat comments into a more useful context for the witnesses and the jury.

Burt argues now that under FED.R.EVID. 403, the chat excerpts with Martin's and Burt's names on them should have been excluded as more prejudicial than probative. Appellee's Br. at 23-24. We give wide deference to the district court in its exercise of discretion to balance prejudicial and probative effects of evidence. United States v. Adames, 56 F.3d 737, 742 (7th Cir.1995). Burt argues that there was little probative use in the admission of the chat excerpts and the potential for great prejudice. We disagree. Recall that one of the main issues in contention in this case was whether Burt created and traded naked pictures of children for legitimate reasons or for sexual gratification. It was the defense's contention that he had legitimate commercial (non-pornographic) interests in these photos. In that context, an internet chat where Martin and Burt traded photos while making overtly sexual comments had tremendous probative value on one of the only serious points of contention between the government and the defendant.

As for being prejudicial, Rule 403 speaks of "unfair prejudice, confusion of the issues, or misleading the jury." There is a difference between evidence that brings unfair prejudice and evidence that is damning. If this chat log were being offered in a prosecution for an unrelated crime, we might be more sympathetic to a claim that it could unfairly prejudice a jury. Being associated with the sexual

exploitation of children tends to do that. But the point is that in this case Burt was being prosecuted for exactly what this chat log depicts: creating, trading, and distributing photos of children for the sexual satisfaction of himself and his online partners. The chat may well have been damning, but we do not see how it created unfair prejudice. We caution that allowing the government to insert the real names in place of the screen names is a path that a district court should be careful to tread. But the court very clearly instructed the jury about the limited extent to which that substitution of names could be considered by the jury, and we emphasize that in this particular trial nobody seriously contended that this internet chat was conducted by anybody other than Martin and Burt. We find no error in the admission of the raw chat logs or the excerpted chats.

C. The Evidence of Austin's Molestation

Finally, Burt argues that the testimony by witness Austin about Burt's molestation also violates FED.R.EVID. 403. Austin was one of three children called by the government during its case. Unlike witness David, whose molestation was recorded on the video which provided the underlying pornography for one of the counts against Burt, Austin's molestation was not documented in any of the photos that made up the counts against Burt. Burt argues that Austin's testimony was likely to unfairly prejudice the jury in excess of any probative value it might have had.

We need only return to the heart of the defense's case to dispense with this argument. As noted above, Burt rested much of his case on the theory that his photos were nonsexual. The government bore the burden of proving that the photos were "lascivious exhibition of the genitals" in violation of 18 U.S.C. § 2256(2)(A)(v). The instructions that the judge gave to the jury on how to determine whether nude photos meet that standard included, as one example, "whether the picture or image is intended or designed to elicit a sexual response in the viewer." Tr. at 570.

Rule 404(b) allows the introduction of prior bad acts as proof of "motive ... intent ... [or] plan." FED R. EVID. 404(b). Austin's testimony was not simply that he had once been molested by Burt. On the contrary, his testimony established that he was repeatedly molested during the period when the photos in question were being taken. The testimony also established that the molestation happened behind closed (and locked) doors, in the same rooms of the house where the photography sessions were conducted. His testimony was directly relevant to the question of whether Burt was a "hard working professional photographer" taking pictures for a legitimate "non-pornographic website" as the defense had stated in his opening statement, or whether he took pictures of naked children because they "elicit a sexual response" in him or his online partners. We do not believe that the district court abused its discretion in admitting the testimony.

III. CONCLUSION

The district court did not abuse its discretion in admitting the testimony of Brelsford, McDonough, or Austin. The admission of the chat excerpts as demonstrative aids was within the discretion of the district court, and was properly accompanied by a limiting instruction to the jury. Finding no error, we AFFIRM the judgment of the district court.

APPENDIX B

[The following pages comprise portions of the trial transcript before the United States District Court for the Northern District of Illinois, Eastern Division, before Judge Wayne R. Anderson, District Judge, which are referenced in this petition for certiorari.]

[MARTIN'S DIRECT EXAMINATION]

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Q. Were the majority of pictures on that Web site of young boys?

A. Yes.

Q. Did Charles Burt post pictures on Star kids?

A. Yes, he had some on there.

Q. Did you use a computer to access Star Kids?

A. Yes.

Q. Mr. Martin, I am showing you what has been admitted in evidence as Government Exhibit Martin Computer. Do you recognize this?

A. I don't know. I -- a computer if a computer, but, you know, it appears to be my computer, yes, you know.

Q. Is that the computer that you used to access Star Kids?

A. It appears to be one of the computers that I used to access Star Kids.

Q. Thank you. Thank you, Special Agent.

Did you keep pictures in video files on your computer?

A. Yes, I did.

Q. Did you also keep pictures of young naked boys on your computer?

A. Yes I did.

Q. Mr. Martin, I am showing you what has been admitted

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in evidence as Government Exhibit Count Four Photo, do you recognize that photo?

A. Yes, I do.

Q. Have you seen it before?

A. Yes, I have.

Q. Where have you seen it?

A. On my computer.

Q. Did you also have a video on your computer?

A. Yes, I did. I have had many videos on my computer.

Q. A video on your computer that showed Charles Burt and a young boy?

A. Yes, I have had several movies on my computer that showed both, you know, Charles Burt and somebody else.

Q. As you got to know Charles Burt through Star Kids, did you chat online with him?

A. Occasionally we -- we chatted, yes.

Q. What was your screen name?

A. BsomeSmoke.

Q. Could you spell that for us?

A. The letter B, then s-o-m-e, s-m-o-k-e.

Q. What was Charles Burt's screen name?

A. At the time it was enter2net. I believe enter2net or, you know -- you know, that was -

· Exsell. Exsell. You know, it is -- I had him on there under Exsell, but it could have been something different. You -- in the program I used you

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kind of specify -- you just change it to whatever name you wanted to so you are able to recognize that person.

Q. So -- so I would like to clarify. So Exsell was one of them?

A. Exsell was what I believe is what I had it under because that is how I knew him, but for-

Q. What about Starved Rock, what that another screen name he used?

A. Starved, Rock, yes. Yes. Yes, that is another name that -- that is his -- that is what he used -- that is what he put down for his name. And when it came up and I just changed it to Exsell because I knew that -- knew him by that name better.

Q. In addition to chatting online with him, did you also trade photos with him?

A. Yes, we traded photos.

Q. Did you also trade web cam images?

A. Occasionally there -- sure, we have turned our web cams on and, you know, when we are talking that way to the web cam, microphone and video.

Q. When you what are talking that way? I am sorry.

A. You know, when we were chatting online sometimes if, you know, I had to do something

-- you know, what -- you know, something else or he was doing something else and didn't have time to sit there and type, we would chat via video and

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A. At the time, you know, there was only one that I knew of, you know, that was there, and that was David at the time. But he -- you know, he -- he is a man and he has had different kids that he has taken care of, you know, his entire life and it is well-known through his photography, you know, that -- that he has taken of children.

Q. Based on your knowledge of Charles Burt did people travel from around the United States and foreign countries to meet Charles Burt's boys?

A. There was rumor to that. But did I ever see anybody else come there? No, I have never seen anybody else come there from other -- you know, but there was rumors that people have met him. I mean he is a very well-known -- very, you know, well-known photographer, great photographer, and people, you know, did want to meet him. I surely wanted to meet him.

Q. You said that Charles Burt sometimes sent you pictures. Did he ever send you naked pictures of young boys?

A. No, absolutely not.

Q. Do you recall an interview with FBI Agent Scott McDonough on August 5th of 2005?

A. You know, there was only a couple of times people seen me, so I am assuming it was the

time --- the last time in Wisconsin that the FBI from Chicago came to see me before I was sentenced, right before I was sentenced, so, yeah.

Q. During that interview did you tell Special Agent --

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Reasonable basis for--for inserting the hypothetical fact into the question.

MS. BICKERT: Well, to allay any fears that either of you might have, I can just let you know the rest of direct is going to go this way. He is going to deny everything. I am going to ask him these questions straight out of his interview. And then we anticipate calling an agent who was present for the interview who will testify to --

THE COURT: Okay. Do you have a copy of the interview?

MR. GREENE: I -- they have given me everything. I just don't know which one you are referring to at this point.

THE COURT: How long --

MS. BICKERT: I am pointing it out during my questions.

THE COURT: Well, why don't you let -- if you let him know, then he can have it out there.

MS. BICKERT: I am point it out by my questions. August 5th and January 23rd. He

has both of them. And I refer to them in the questions. I just did.

THE COURT: Okay. So why don't we -- when we get out there, why don't you segregate those papers so you can look at them.

MR. GREENE: Okay. This is Brelsford?

MS. BICKERT: The

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January one is Brelsford. The August one is Scott McDonough.

MR. GREENE: Okay

(Proceedings heard in open court)

THE COURT: I am going to overrule the objection. However, I do want to give the jury -- remind the jury of this: As I said in my opening instructions to you, what lawyers say isn't evidence. And so, for example, is Ms. Bickert utters like what seems to be a fact, she is not a witness. We have to get the facts from the -- the witness stand. So I am going to allow her to ask the questions, but she does not give evidence. And when Mr. Greene cross-examines, he may well posit it some potential facts in his question. The evidence comes from the witnesses and the documents and the stipulations.

MS. BICKERT: Thank you.

THE COURT: Okay, please proceed.

BY MS. BICKERT:

Q. Mr. Martin, I am going to ask you the question that I just asked you. During your August 5th 2005 interview with t he FBI did you tell the FBI that Charles Burt had sent you a series of naked pictures of Tristin and Austin, two little boys, playing naked with finger paint on their bodies?

A. No, I did not.

Q. During that same interview did you also tell Special Agent McDonough that you had received from Charles Burt a

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series of shower photos that showed Charles Burt naked in the shower with a boy named Austin?

A. You want a yes or no answer? I mean, you know, again --

Q. Did you tell the FBI?

A. No, I did not, not that I got it from Charles Burt, I did have those but not from Charles Burt.

Q. During --

MR. GREENE: Your honor, excuse me. I would ask the prosecutor not to hold her notes or whatever she is reading from too closely.

THE COURT: Yes, the camera picks them up.

MS. BICKERT: Oh, is it on?

MS. KENDALL: No.

MS. BICKERT: It is not on.

THE WITNESS: I can see -- everything you put on that thing I can see right here.

THE COURT: Right. So, you know -- the jury's monitor isn't on, but some of the others might be.

MS. BICKERT: It is off.

THE COURT: Including Mr. Burt.

MS. BICKERT: It is off now.

THE COURT: Okay.

MS. BICKERT: We don't have anywhere else to put the stuff, frankly.

BY MS. BICKERT:

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Q. During your January 2004 interview with the Milwaukee FBI, did you tell the FBI that you had received sexually-explicit images of young boys from Charles Burt?

A. Not from Charles Burt, no.

Q. You testified earlier that you and Charles Burt watched one another's Web cam. Did you ever record Charles Burt's web cam.

A. Yes, I have.

Q. Did you record it without his knowledge?

A. Yes.

Q. Did you ever see Charles Burt and a young boy that you mentioned named David in the videos?

A. Yes.

Q. Did you record a web cam image from Charles Burt that showed Charles Burt engaging in oral sex with a little boy named David?

A. No.

Q. Do you recall during your January 2004 interview with agents of the FBI in Milwaukee -- did you tell the agent that you had in fact seen Charles Burt perform oral sex on one of Chuck's children named David?

A. I tried to tell them that there was a movie that was created. What I mean by "created" was, you know, it was created -- it was -- it was not real that was of that -- what you are talking about. But I was stopped by the interviewer --

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A. Yeah. During the interview, I -- it was very confusing, you know, exactly the - the questions that -- being asked because there were several people there talking sometimes at the same time. But ultimately I -- I tried my hardest at the time to -- to let you guys know, the FBI know, that -- that web cam image or that web cam video that I had had on my computer was not -- that I did not directly see that as it was happening live and I did not record that as it was happening live and that it also was edited and it wasn't real. And, in fact, I -- you know, there is a lot of people that can create that with -- as you know by my computer -- you have everything on there -- and what is there itself. I did not create it but somebody else did.

And that it what I was trying to tell you at t hat time, but I wasn't listened to. I was told to

cooperate or else and in -- from my attorney, you know, which is a -- appoint -- a court-appointed attorney, that if I didn't cooperate, it was going to go bad for me. And I interpreted that as just to sit there and answer yes and no questions and not elaborate on anything. And that is what I did from that point forward.

Q. So you deny -- you deny telling the FBI that you received that from Charles Burt, the video of the oral sex with David

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-- no, the cam?

A. I did not -- I did not receive that from him -- you know, and I did not every say that I did receive it from him. But there was questions that were really confusing at the time and that -- you know, that maybe could have led you to believe that I said it. I don't know. But I did not say that because I did not receive it from him.

Q. Did you send an e-mail to a friend of yours on your computer where you talked about having a video in which Exsell, Charles Burt, was "sucking his boy"?

A. An e-mail? Not to my knowledge. I have -- I don't recall ever sending an e-mail, you know, with any type of, you know, illegal -- you know, words of any illegal activity on it or anything, so

Q. Has Charles Burt ever told you about his sexual interest in young boys?

A. No.

Q. In your interview with the FBI on January 23rd, 2004 did you tell the FBI that Charles Burt told you that "all kids like to get blow jobs?

A. On that interview January 23rd when I was arrested, I was being threatened, you know, with life in prison, which is not just like the prison you guys know. It is in the shoe. It is where you are locked up24 days a day, seven days a week, or you are beaten and possibly killed with this type of --

[AGENT BRELSFORD'S DIRECT EXAMINATION]
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Q. Who was present when he made that statement?

A. Myself and FBI Special Agent James Doyle.

Q. Where was that statement taken?

A. The statement was taken at the Beaver Dam Police Department.

Q. During that conversation -- and -- what day was that conversation?

A. That was on January 23rd.

Q. During that conversation did Mr. Martin admit to receiving and sending sexually-explicit images of young boys through his computer?

A. Yes, he did.

Q. Did he tell you what his screen name was when he used to do that?

A. He said his screen name was BSomeSmoke. B-S-o-m-e-s-m-o-k-e, I believe.

Q. Did he mention where he met the people that he trade -- -- or, I am sorry, did he -- did he mention where he met the people that he traded images with of sexual -- I am sorry, that he traded sexually-explicit images of young boys with?

A. He indicated that he met some of the people who he traded sexually-explicit images with on a Web site named Star Kids.

Q. Did he tell you anything about that Web site?

A. He said that Star Kids itself was a --

MR. GREENE: I am going to object. Judge, it is

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hearsay.

MS. BICKERT: Your honor, this is going not for the truth but to impeach Mr. Martin, as will much of his testimony.

MR. GREENE: Then it is --

THE COURT: Let's have a side bar on that whole issue then.

(Proceedings heard at side bar)

THE COURT: Let me get this straight. The Government called Mr. Martin. Mr. Martin gave a bunch of answers that you don't thing were truthful or complete.

MS. BICKERT: I have got a suspicion.

THE COURT: Okay. And now you want to bring to whom he told something contrary in the past, right?

MS. BICKERT: He denied making the statements to this person.

THE COURT: Right. So -- so the issue is for what are you -- are you calling this witness, the FBI agent who is on the stand now, to impeach your witness that you called?

MS. BICKERT: No.

THE COURT: Wait. Okay. That is okay. It is late in the day, so if you both want to join in.

MS. BICKERT: It is the one.

THE COURT: Or do you want to in fact prove that he did say the things that he previously said? And, if so, how

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is that not hearsay?

MS. BICKERT: Well, it is -- in giving his statements that is perfecting the impeachment of Mr. Martin, which is not hearsay.

THE COURT: What do you mean by that?

MIS BICKERT: Well, in order to impeach Mr. Martin we had to lay the foundation of having him -- of saying, did you say this to the agents, and him denying it. And then we perfect the impeachment by calling the agent and saying, in fact, he did say these things?

THE COURT: So let's take some really important issue here. What did Mr. Martin deny that you wish

the jury -- that you wish he had truthfully said he actually did?

MS. BICKERT: Whether he received the charged sexually-explicit images from Charles Burt.

THE COURT: Okay. Let's say he denied that or said, I don't recall, or whatever it was -- or let's say he said to this agent, oh, yes, Charles Burt sent me this -- such and such an image, all right? For what purpose do you want to have that -- the statement made to the agent admitted?

MS. BICKERT: The -- it is two purposes really. One is to -- it is relevant to Mr. Martin's credibility. It impeaches Mr. Martin. And two is this is actually directly relevant -- to in other words, this is not like some sort of collateral matter. This is -- these are statements that are --

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THE COURT: You want -- want it admitted for the truth of the matter asserted therein, right? You want the jury to believe Mr. Burt did send the pornographic materials to Mr. Martin, correct?

MS. BICKERT: That is not the impeachment purpose.

THE COURT: No, but that is the -- but that is a -- the more important purpose because in fact you want to be

able to argue to the jury when the case is over that Mr. Burt sent pornographic material to Mr. Martin.

MS. BICKERT: Well, I would love to be able to argue that.

THE COURT: Well, with -- unless -- there is some -- and if Mr. Martin denied it, unless you have forensic evidence that is what was done, which I gather we don't have, then what evidence to we have that it was done?

MS. BICKERT: We --

THE COURT: We have, I guess, the statement of the previous witness who said that he had gotten images from Mr. Martin, right?

MS. BICKERT: We have already introduced forensic evidence that it was done, that is, that these images were taken in Mr. -- I'm sorry, were retrieved from Mr. Martin's computer that was taken from Mr. Martin's house.

THE COURT: Right, right. But he -- but this

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morning he denied getting it from Mr. Burt --

MS. BICKERT: But I want the jury to believe he did get it from Mr. Burt. I would like it if they believed that.

THE COURT: Well, no, that is perfectly fine. That is what I expect. So what admissible fact do you -- what admissible evidence do you think you are going to be able to cite to prove that he got it from Burt?

MS. BICKERT: There is a -- I am not sure I understand what it –

THE COURT: I am concerned that there would be a hearsay --

MS. BICKERT: Here is why it is not hearsay: Because all of the information that he is testifying to --

THE COURT: "He" meaning?

MS. BICKERT: This agent.

THE COURT: Okay.

MS. BICKERT: -- is directly perfecting the impeachment. I actually have written my questions directly on what is relevant to the matters at hand that Mr. Martin denied saying today. So all of these are -- - are admissible, if strictly for impeachment they are admissible.

THE COURT: Right. I suppose that would enable you in your closing statement to say, the person we chose to

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bring in here is a big liar, which raises an interesting question, why would you bring him in. But

are you willing to stop or do you want to also say and, moreover, he told the agent he did send the stuff, Burt, and therefore, you can conclude beyond a reasonable doubt he did?

MS. BICKERT: That is --

THE COURT: That is a significant issue.

MS. KENDALL: Also, actually -- and I recognize the thorniness of it -- there is evidence independent of Mr. Martin's statement that corroborates the impeaching statement.

THE COURT: That will be coming?

MS. KENDALL: So, for example, it would be, I think, along the lines - it is arguably improper for her to say, because she impeached him and perfected the impeachment through this witness, that the truth is what this witness is saying.

THE COURT: Right.

MS. KENDALL: That is the improper part.

THE COURT: Okay.

MS. KENDALL: Because it is only to be used for impeachment. But she ought to be able to say during closing, and, you know, that the truth is that the images were on Mr. Martin's computer and so when he told you that he never got images

from Burt, Charles Burt, he was not telling the truth.

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MS. BICKERT: Right.

MS. KENDALL: So she ought to be able to perfect the impeachment by saying very cleanly, did you ask him this question and did he give this answer? Yes. Or I mean, you know, when -- when you asked him this question –

MS. BICKERT: Right.

MS. KENDALL: What was his answer?

THE COURT: Well, I guess -- I guess from my point of view you could argue the image that we know was created in Mr. Burt's computer room is on Mr. Martin's computer. All right? And -- and I suppose a jury can infer from that then that Mr. Burt sent it to Mr. Martin or it was sent with his knowledge. However -- and then I think you could also say, and even though Mr. Martin denied it, we k now that that denial cold be disbelieved because the agent said something different.

MS. BICKERT: I think I --

THE COURT: But then I think that is as far as you could go. I don't think you could say that what he told the agent -- you are entitled to believe what he told the agent

MS. BICKERT: That is fair.

THE COURT: -- because that is hearsay.

MS. KENDALL: That is fair.

THE COURT: Obviously, Mr. Greene, in his closing statement can point out that, well, the only direct evidence

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then is the fact that it appeared on Mr. Martin's screen and we know from Mr. Martin's testimony, as well as, frankly, common human experience that these images can go around from place to place and the fact that it is on Mr. Martin's screen doesn't mean that he got it from Mr. Burt.

MS. BICKERT: That is fine. I agree.

MS. KENDALL: Fine.

THE COURT: So, you know, the jury is going have to draw --

MS. KENDALL: That is fine.

THE COURT: The communication of that -- of these pictures from Burt to Martin, what -- what element of your case is that important to?

MS. BICKERT: The interstate transportation -- one of those counts charge interstate distribution of that one photo.

THE COURT: Just -- is this only relevant to one of the counts?

MS. BICKERT: Only -- no, it is relevant to two of the counts.

MR. GREENE: But the thing is --

MS. BICKERT: Other than that, we also -- I mean I know you are just giving a summary of things, but it is not as though our only evidence of the images being transferred from Burt to Martin is on his computer.

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THE COURT: They are friends. They talked.

MS. BICKERT: I totally hear your point. We will use this strictly for impeachment purposes, won't argue it improperly at closing.

THE COURT: We are back to your objection. Now you see what their objective is.

MR. GREENE: Right. But I -- the first think is that Martin admitted that he didn't -- he did not -- Burt knew nothing about these images being transmitted, knew nothing about that. And for the Government now to ask Agent Brelsford a hearsay question, it is still offered for matter -- it is still offered for the truth of the matter asserted.

THE COURT: If they tried to do that and -- I would interrupt them and stop. In fact, I think what I ought to do, since apparently what she is

going to do is run through, I believe, areas that she thinks were differences between the answers Martin gave us and the statements he made to the agent. I think what I am going to do, rather than us being back here the whole time, is tell the jury that I will allow her to ask those questions only for the purpose of helping the jury to understand or casting doubt, from her point of view, on the honesty of the answers Mr. Martin gave to us --

MS. BICKERT: Yes.

THE COURT: -- but not to prove that the statements he told to the agent were actually true. And then in closing

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argument I just think that the -- the prosecutors have to carefully craft their argument not to cite those statements to prove what happened.

MS. BICKERT: Yes.

MS. KENDALL: That is right.

THE COURT: They are buddies, they talked all the time, they visited, it was here, it was there, you know. And -- and that gives you plenty of fodder to work with to say that he didn't send them.

MS. BICKERT: Yes.

THE COURT: And, obviously, also you have Martin's testimony that he felt some sense of coercion when he gave statements. You know, I think that is a fair closing argument too.

MR. GREENE: I am still worried about the effect this Agent's testimony is going to have on one of the Government's own witnesses. You know, it is like they are impeaching their own witness. Martin is --

THE COURT: You should be happy.

MR. GREENE: I am. That is why I didn't say too much in Mr. Martin, you know.

THE COURT: Right. Okay. So I would say -- but I am going to give them that advanced limiting instruction --

MR. GREENE: Okay.

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THE COURT: -- so they understand, or try -- I will try to do it. And, obviously, we can include that in one of our jury instructions.

MS. BICKERT: It is already in there, actually.

THE COURT: I have thought about --

MS. BICKERT: We had a suspicion Mr. Martin might not be entirely forthcoming on the stand.

(Proceedings heard in open court:)

THE COURT: Maybe we will go until Monday or Tuesday. No, I am just kidding. The -- maybe it will be above freezing by then.

Miss Bickert intends to ask this witness a series of questions which she believes -- we don't know until we hear the answers -- which she thinks might contradict and, therefore, undermine the credibility of some of the answers that Mr. Martin gave to us in court this morning. You are -- a lawyer entitled to impeach the credibility, as we call it, to question the honesty of answers given by a witness by bringing out evidence of prior statements that the witness made.

However, those prior statements themselves cannot be used as evidence to prove something. And so, for example, if Mr. Martin said to Mr. Burt -- said to the agent, oh, Mr. Burt sent me those images, whereas this morning he said, I didn't get those from Mr. Burt or I can't remember if I got [p.403]those from Mr. Burt, Miss -- Monika Bickert can ask this agent questions so that you doubt, if you choose to, the honesty of what Mr. Martin said in court, but she cannot use what -- what Mr. Martin told this agent to prove that Mr. Burt sent the images to Mr. Martin. She would have to have other evidence that was direct, not statement that somebody made outside of court to prove that.

So I think she is going to ask a series of questions and I just want you to keep in mind that those questions can be used by you, if you choose to -- used by you to determine whether or not you want to believe Mr. Martin's statement that he made here in court, but they cannot be used by you to prove the truth of what the agent says Mr. Martin said to him.

And there will be more instructions on that in the future. And then in closing argument they will be guided by that as well.

Okay. And I am not going to -- and so there will be a standing objection by Mr. Greene to these questions for the reasons stated. But so that this flows more smoothly, anticipating those objections, his failure to object during the questioning of this witness along these lines is not a waiver. So you can -- you are preserving that objection. And that is my ruling on all these proposed questions. Okay, please proceed.

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MS. BICKERT: Thank you, your Honor.

BY MS. BICKERT:

Q. You had just testified about the Star Kids Web site. Did Mr. Martin during your interview with him tell you if he had met Charles Burt?

A. Yes, he said that he had met -- well, he indicated that he met an individual named Chuck residing in Streator, Illinois on two different occasions, physically meeting him.

Q. Did he tell you whether he had met that individual online?

A. Yes, he had previously met him online.

Q. When he met Chuck online, what was Chuck's screen name, according to Mr. Martin?

A. Check used the screen name Exsell, E-x-s-e-l-l.

Q. Did Mr. Martin tell you whether Exsell or Chuck was actually an administrator of the Star Kids Web site?

A. Mr. Martin said that Exsell was an administrator of the Star Kids Web site.

Q. You said that Mr. Martin said he met Chuck two times in person. I am sorry, I withdraw that question.

Did Mr. Martin say whether Chuck sent him sexually

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-explicit images of young boys over the Internet?

A. He indicated that he had.

Q. That Chuck had?

A. That Chuck -- that Exsell had sent Mr. Martin sexually-explicit images of children.

Q. Did Mr. Martin tell you about seeing a web cam video of Chuck's in which Chuck performed oral sex on a little boy?

A. Yes, he did.

Q. Did he tell you where he got that web cam video?

A. Mr. Martin told us that is -- that a live web cam capture from Mr. -- or from Exsell's computer, Chuck's computer, web cam attached to it, that Mr. Martin was viewing on his computer at his residence.

Q. And by "a live web cam" do you mean that the act was actually occurring as Mr. Martin was watching it on his computer?

A. Yeah, in real-time as opposed to a film that Mr. Martin obtained later.

Q. Did Mr. Martin tell you the name of the little boy in the video?

A. Mr. Martin said the boy's name was David.

Q. Did Mr. Martin tell you whether Chuck had ever said to him all kinds like to get blow jobs?

A, Mr. Martin did say that, yes.

Q. Special Agent Brelsford, I am showing you what has been admitted in evidence as Government Exhibit Starved Rock Chat and what has been marked for identification as Government Exhibit Starved Rock Chat Excerpts. Have you ever seen those before?

[AGENT MCDONOUGH'S DIRECT EXAMINATION]

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Q. And in this particular case did you have the opportunity to review the computer analysis and computer images taken from Charles Burt's computer?

A. Yes, I did, several times.

Q. Did you also have the opportunity as part of this case to review the computer images and the computer analysis taken from Bill Martin's computer?

A. Yes, I did.

Q. Earlier in the week, Agent, there was a question regarding the number of images that Todd Glud retrieved from the computer. And I am showing you now what is marked as Government Exhibit Burt Computer Images. And, counsel, this is what you just reviewed a moment ago. Agent, what is this that I have just handed you?

A. This is a printout of several images that were recovered off of the defendant's computer.

Q. Now, in the indictment in this case there is seven charged images and one charged video, correct?

A. That is correct.

Q. And how many images are here?

A. I believe there are 34 images here.

Q. Are those all from Chuck Burt's computer?

A. Yes, they are.

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Q. I would like to ask you some questions about an interview that you did with a man named Bill Martin. Do you recall that?

A. Yes, I do.

Q. When did you interview Bill Martin?

A. I believe it was August 3rd 2005.

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Q. Where did you interview Bill Martin?

A. At the County Jail in Green Bay, Wisconsin.

Q. Who was present for that interview?

A. Myself, Assistant U.S. Attorney Virginia Kendall, Assistant U.S. Attorney Monika Bicker, Assistant U.S. Attorney Bill Roach and defense attorney Tom Philip.

Q. Was the defense attorney present throughout the entire interview?

A. Yes, he was.

Q. During that interview -- were you aware at the time of that interview of whether Mr. Martin had been sentenced yet?

A. I was aware that he had not been sentenced yet.

Q. And were you aware that he was expecting to receive a 50-year plea agreement for cooperating with the Government?

A. Yes, I was.

Q. During that interview -- I would like to ask you some questions. Did Martin tell you that he communication with Charles Burt online?

A. Yes, he did.

Q. Did he say to you whether Charles Burt sent him pictures of young boys?

MR. GREENE: Objection. Hearsay.

MS. KENDALL: Proving up impeachment, Judge. Different interview, different day.

THE COURT: And who asked that?

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MS. KENDALL: Did Martin tell you that he communication with Charles Burt online?

THE COURT: Okay. I will allow him to answer that question but for the limited purpose of you evaluating the truthfulness of Martin's previous testimony, not for the proof of whatever the witness says Martin said to him. Okay. What is the answer?

BY MS. KENDALL:

Q. Did Martin say whether Burt ever sent him pictures of young boys?

A. Yes, he did.

Q. Did he ever say to you whether he sent him pictures of naked boys?

A. Yes, he did.

Q. And specifically what did he tell you?

A. He told me that he had received the shower series and the finger paint series.

Q. During the interview on August 3rd of 2005 did Martin tell you about his knowledge of Burt's sexual interest in boys?

A. Yes, he did.

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Q. What did he tell you?

A. He told me ··

MR. GREENE: Same objection to that, your Honor. Continuing objection.

THE COURT: To this whole series of questions the objection Mr. Greene made earlier and with the previous witness will stand. I will allow the U.S. Attorney to ask that same sorts of questions. And I just ·· I don't want to repeat the admonition that I just made a few minutes ago, but that same admonition applies. I don't want to repeat it because when I finished say it, I thought I was pretty articulate, and I am not sure I could say it any better, so ·· okay.

BY MS. KENDALL:

Q. The question was whether Martin told you about his k knowledge of Chuck Burt's interest in ·· his sexual interest in young boys.

A. Yes, he did.

Q. What did he tell you?

A. Mr. Martin told me that Chuck Burt was sexually interested in young boys and all boys loved oral and he loves kids.

Q. During that interview on August 3rd, 2005 did you show Bill Martin the video that is Count Five Video pertaining -- that contains the images of Charles Burt and David?

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A. Yes, I did.

Q. And did Martin tell you how he came to obtain that video?

A. Yes, he did.

Q. What did he tell you?

A. Mr. Martin told me that he viewed a live web cam broadcast of the sexual activity or what he believed to be sexual activity with Mr. Burt and a young boy named David. Hel also told me that the web case was very long and that he had edited and shortened it for content for what is portrayed.

Q. And, finally, did Mr. Martin tell you what he believed the video contained?

A. Yes, he did.

Q. And what did he say?

A. To quite Mr. Martin, he said, it is pretty fricking obvious that Mr. Burt's mouth is on his penis.

Q. At any time during this interview did Mr. Martin indicate to you that he was afraid?

A. No.

Q. At any point in this interview did you threaten Mr. Martin?

A. Absolutely not.